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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

MAY 12 1993

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )

Implementation of Sections 11 )  
and 13 of the Cable Television )  
Consumer Protection and Competition )  
Act of 1992 )

MM Docket No. 92-264

Horizontal and Vertical Ownership )  
Limits, Cross-Ownership Limitations )  
and Anti-trafficking Provisions )

REPLY COMMENTS  
OF THE  
NATIONAL TELEPHONE COOPERATIVE ASSOCIATION

The National Telephone Cooperative Association ("NTCA") submits these Reply Comments in response to comments filed in this docket on February 9, 1993. The comments were filed in response to a Notice of Proposed Rule Making and Notice of Inquiry, ("NPRM/NOI"), FCC 92-542, released by the Commission on December 28, 1992.

The Commission is seeking comments on rules to implement Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992 (the "Act"). Section 13 contains the cable anti-trafficking rule which, with certain exceptions, prohibits the sale or transfer of ownership in a cable system within three years following the acquisition or initial construction of the system. Section 11 establishes restrictions on cross-ownership and requires the Commission to conduct a proceeding prescribing subscriber limits and channel occupancy limits. It also requires the Commission to consider whether

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additional restrictions are required to limit the ability of multichannel distributors to engage in the creation or production of video programming. NTCA is submitting limited replies to comments on proposed regulations implementing both of these provisions.

NTCA is a national association of approximately 500 small and rural local exchange carriers ("LECs") providing telecommunications services to interexchange carriers ("IXCs") and subscribers across rural America. Approximately 150 of NTCA's members operate small cable television systems in their telephone service areas. Most of these members provide service under the rural exemption to the telephone/cable cross-ownership rule in 47 C.F.R. § 63.58. Some NTCA members with CATV systems also provide Multichannel Multipoint Distribution Service ("MMDS"); others provide MMDS but not CATV.

#### DISCUSSION

I. THE COMMISSION SHOULD LET STAND THE CURRENT MMDS CROSS-OWNERSHIP RULES.

The Commission stated in the NPRM that recently adopted MMDS cross-ownership rules "are consistent with and effectively implement the cross-ownership prohibitions of the 1992 Cable Act."<sup>1</sup> These rules, 47 C.F.R. § 21.912, prohibit an MMDS company from owning, leasing, or controlling a CATV system in a geographic area which overlaps the MMDS protected service area.

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<sup>1</sup> NPRM at 26.

The rules apply to cable franchise areas lacking two or more competing cable television companies. They contain an exception for rural areas similar to the 2,500 cable/telco cross-ownership exception.<sup>2</sup> The exception permits CATV operators in rural areas to use MMDS to provide service to parts of their cable franchise area where economies of scale and technological difficulties make CATV service uneconomic or infeasible.

In earlier comments, NTCA along with several other of the commenting parties supported the Commission's conclusion that this exception is in the public interest. For example, the National Cable Television Association Inc. ("NCTA") states that "it is critical that the Commission retain its existing exceptions for rural areas and local programming and its public interest waiver standard."<sup>3</sup> Three Rural Telephone/Cable Companies also support the exemption and believe "(t)he current

Warner Entertainment Company, L.P. ("Time Warner") urge the Commission to retain the rural exception to foster the provision of cable service to rural areas.

NTCA also agrees with commenters making the point that Congress intended an even narrower cross-ownership restriction than that provided for in 47 C.F.R. § 21.912.<sup>6</sup> These parties point out that Section 11(a)(2) of the Act, 47 U.S.C. § 533(a)(2) permits the grant of a license to a cable operator in its franchise area, as long as the MMDS or satellite master antenna television service ("SMATV") service area does not overlap the area "served" by the cable system. This narrower cross-ownership restriction reflects the Congressional intent to promote diversity in media ownership while balancing genuine and significant efficiencies. A narrow restriction allowing CATV systems to provide MMDS in unserved areas of their franchise will fulfill the Congressional intent and allow NTCA members operating

MMDS in those sparsely populated and difficult to wire areas where MMDS is more feasible and economical.<sup>7</sup>

Cablevision of Texas III, L.P. (Cablevision) states that it "is currently competing directly with wireless cable operators."<sup>8</sup> Cablevision disagrees with the Commission's belief that existing MMDS cross-ownership rules are consistent with the intent of the Act. Cablevision believes the existing rules are too liberal and should be modified.<sup>9</sup> GTE Service Corporation

"GTE" also disagrees with the Commission. Both

The Commission established the rural exemption in Second Report and Order, in General Docket Nos. 90-54 and 80-113, 6 FCC Rcd 6792 (1992), on the basis of a record demonstrating that the exemption was needed to speed the introduction of multichannel service in sparsely populated areas.<sup>11</sup> The exception is consistent with the policy expressed above and nothing has changed since the exception was created. Now, as then, small CATV systems in these sparsely populated areas can best provide multichannel services to entire communities if they have the ability to complement CATV service with MMDS service. The exception will give operators the option to use MMDS in sparsely populated areas where terrain and other factors make MMDS the more feasible alternative for reaching subscribers.

In view of the clarity of Section 11(a)(2) of the Act, 47 U.S.C. § 533(a)(2), the policy expressed in 47 U.S.C. § 521, and the public interest, NTCA urges the Commission to (1) retain the rules in 47 C.F.R. § 21.912 and (2) clearly state that CATV operators do not need waivers or exemptions to provide MMDS in

prohibiting "profiteering" and the obvious public interest in narrowly applying restrictions on alienability.<sup>12</sup> Specifically, NTCA agrees that the three-year holding period should not apply retroactively. Time Warner correctly comments that the Commission should grandfather systems acquired or constructed prior to effectiveness of the Act to prevent retroactive interference with vested contractual rights.<sup>13</sup> NTCA agrees. The legislative history evinces no clear intent to apply the holding period retroactively and the Commission should not interpret the statute to permit retroactivity.

The Commission requests comment on what date should be used to determine the initial holding period and on how it should determine the date of acquisition. NTCA agrees with TCI, and others commenting that the holding period should be measured by reference to objectively identifiable dates.<sup>14</sup> Parties should not have to engage in guessing games to determine whether proposed transactions will evoke the anti-trafficking provisions. Uncertainty in the rules will promote waste by encouraging unneeded disputes and litigation, both of which most often work to disadvantage small companies and favor large entities that have the "deep pockets" required to engage in lengthy disputes and litigation.

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<sup>12</sup> Comments of Tele-Communications, Inc. ("TCI") at 43 and Time Warner at 4.

<sup>13</sup> Time Warner at 7; NCTA at 54; and Liberty Media Corporation at 42.

<sup>14</sup> TCI at 49 and Time Warner at 10.

NTCA also concurs with the Commission's proposal to grant conditional waivers prior to the franchise authority's grant of approval in cases where, under 47 U.S.C. § 537(d), the franchise agreement requires approval of the franchise authority to any transfer or assignment. Conditional waivers will benefit the public by speeding the approval process. In requiring that franchise authorities act on approval requests within 120 days, Congress expressed its intent that the approval processes should not be protracted. NTCA believes that this intent will be fostered by conditional waivers. In addition, NTCA agrees with parties that urge the Commission to establish specific standards and definitive boundaries for the commencement of the 120-day period provided for under 47 U.S.C. § 537(e).<sup>15</sup> These boundaries should also apply in cases involving Commission waivers under 47 U.S.C. § 537(d). Definitive boundaries and standards will promote uniformity and enforcement of the Act and prevent the incurrence of unnecessary litigation costs and other expenses associated with uncertain deadlines and vague guidelines.

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<sup>15</sup> See, NCTA at 51 and Time Warner at 44.



CONCLUSION

For the above stated reasons, NTCA urges the Commission to adopt rules consistent with these comments.

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I, Rita H. Bolden, certify that a copy of the foregoing Reply Comments in MM Docket No. 92-264 of the National Telephone Cooperative Association was served on this 12th day of May 1993, by first-class, U.S. Mail, postage prepaid, to the following persons on the attached list:

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